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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1353

ROBERT BOSCH GmbH,

Petitioner,

v.

HELMUT A. PAPENDICK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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Robert Bosch GmbH,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Opinion Below

The opinion of the Delaware Supreme Court, not yet reported, is set forth in pages 1a to 14a of the Appendix to this petition. The opinion of the Delaware Superior Court is reported in 389 A.2d 1315 (Del. Super. Ct. New Castle 1978) and set forth in pages 15a to 22a of the Appendix.

Jurisdiction

On December 5, 1979, the Delaware Supreme Court reversed the decision of the Delaware Superior Court and held that the State of Delaware may exercise *in personam* jurisdiction over petitioner Robert Bosch GmbH in this case; the decision of the Delaware Supreme Court was filed December 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented

Whether a Delaware State Court, consistent with the Due Process Clause of the Fourteenth Amendment, may exercise *in personam* jurisdiction over a foreign corporation where (a) that corporation has no contact with Delaware other than the formation of a subsidiary for a purpose which bears only an incidental relationship to the cause of action sued upon; (b) the Delaware subsidiary itself has no contact with Delaware aside from its incorporation there; (c) neither plaintiff nor the cause of action sued upon has any other connection with Delaware; and (d) no showing has been made that the Delaware subsidiary is the alter ego of its foreign parent?

Constitutional Provision and Statutes Involved

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Delaware statutes relating to the situs of ownership of stock and foreign attachment against foreign corporations.

Section 1 of the Fourteenth Amendment to the United States Constitution, in pertinent part, provides:

> "No State shall * * * deprive any person of life, liberty or property, without due process of law * * *."

The Delaware statutes, 8 *Delaware Code* § 169 and 10 *Delaware Code* § 3507, provide:

> § 169. *Situs of ownership of stock.*
>
> For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.

> § 3507. *Foreign attachment against foreign corporations.*
>
> A writ of foreign attachment may be issued against any corporation, aggregate or sole, not created by or existing under the laws of this State upon proof satisfactory to the court that the defendant is a corporation not created by, or existing under the laws of this State, and that the plaintiff has a good cause of action against the defendant in an amount exceeding $50.

Statement of the Case

A. *Statement of Facts*

Respondent Helmut A. Paperdick, plaintiff in this action, is a citizen of the Federal Republic of Germany who at the time this action was commenced, resided in the State of Maryland. Petitioner Robert Bosch GmbH ("Bosch GmbH"), one of two defendants herein, is a corporation organized and existing under the laws of the Federal Republic of Germany. It is the parent company of the Bosch Group, whose principal activities include the manufacture and sale of electric and electronic, mechanical and other equipment for motor vehicles, telephone and radio sets, power tools, domestic appliances, cine-cameras and projectors, television studio equipment and packaging machinery.

The other defendant is Robert Bosch North America Incorporated ("Bosch N.A."), a corporation organized and existing under the laws of the State of Delaware,

with its principal place of business in Broadview, Illinois. At the time this action was commenced, 93.75 percent of the outstanding stock of Bosch N.A. was owned by SIBA—Elektrik GmbH, a West German corporation wholly owned by Bosch GmbH; the remaining 6.25 percent of the stock of Bosch N.A. was directly owned by Bosch GmbH.

The facts giving rise to the present action and to the motion to dismiss of Bosch GmbH for lack of *in personam* jurisdiction are as follows. In April of 1975, respondent mailed from Maryland a form finder's fee agreement to Rudolf Scharpff, an officer of Bosch GmbH, in Stuttgart, West Germany. No negotiations in connection with that agreement took place in Delaware, and the agreement was executed in Maryland by respondent and by Bosch GmbH in Stuttgart.

On or about January 11, 1977, Bosch GmbH and Borg-Warner Corporation ("Borg-Warner") entered into a stock purchase agreement whereby Bosch GmbH agreed to purchase and Borg-Warner agreed to sell to Bosch GmbH or to its designee two million shares of the common stock of Borg-Warner for the price of $62.9 million. The negotiations leading up to this agreement occurred at the headquarters of Borg-Warner in Chicago, Illinois and of Bosch GmbH in Stuttgart, West Germany, and by written communications between the two cities. Additionally, in connection with the agreement, Bosch GmbH communicated with its U. S. counsel in New York by means of telephone calls, telexes and correspondence, and there were further communications between its New York counsel and Borg-Warner in Chicago.

On January 3, 1977, Bosch N.A. was incorporated in Delaware under the name of New American Investment Corporation for the purpose of managing investments in

various corporations, including affiliates of the Bosch Group; on February 8, 1977 the name of this company was changed to Robert Bosch North America Incorporated. Thereafter, on February 10, 1977, Bosch GmbH designated Bosch N.A. as the assignee of its right to purchase the Borg-Warner shares under the January 11, 1977 purchase agreement. The closing took place in Chicago on February 16, 1977. On May 17, 1977, respondent filed this action for a finder's fee of $729,000 in connection with the purchase of the Borg-Warner shares.

No officer, director, employee, agent or representative of Bosch N.A. had any contact with the State of Delaware in connection with the acquisition of the Borg-Warner stock. Bosch N.A., whose only place of business is in Broadview, Illinois, has never transacted any business in Delaware. Although a Delaware corporation, Bosch N.A. has had no other contact with Delaware and owns no property there, except to the extent that the situs of the two million shares Bosch N.A. holds of Borg-Warner, a Delaware corporation with its principal place of business in Chicago, might be deemed to be in Delaware by law.

Jurisdiction over Bosch N.A. was obtained by service of the summons and complaint on May 18, 1977 on its designated agent in Wilmington, Delaware. At the same time, respondent attempted to obtain *quasi in rem* jurisdiction over Bosch GmbH under the Delaware Code by attachment of certain shares of Bosch N.A. owned directly or indirectly by Bosch GmbH. In connection with such attachment, a writ of foreign attachment was served on the Wilmington agent designated by Bosch N.A.

On September 15, 1977, Bosch GmbH filed its motion to dismiss the complaint on the ground that the Delaware Superior Court did not have *in personam* jurisdiction over Bosch GmbH, relying on the then recent decision in

Shaffer v. *Heitner*, 433 U.S. 186 (1977), and its holding that the "minimum contacts" theory as set forth in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), applied to issues of *quasi in rem* jurisdiction. Thereafter, by decision dated June 20, 1978, the Delaware Superior Court granted the Bosch GmbH motion to dismiss, holding that *Shaffer* was applicable to cases wherein jurisdiction was premised on foreign attachment as well as sequestration, and that the mere incorporation of a subsidiary corporation in Delaware was not a contact sufficient to expose a foreign parent to the *in personam* jurisdiction of the Delaware courts where the parent corporation had no other contacts with the State (15a-22a).

On July 6, 1978, because of the novelty of the issues posed under Delaware law, respondent was granted leave to appeal by the Superior Court, and the Delaware Supreme Court accepted the interlocutory appeal on August 31, 1978. By decision dated December 5, 1979, the Delaware Supreme Court reversed the decision of the lower court on the grounds that the "minimum contacts" test set forth in *International Shoe* had been satisfied in that:

> Here, unlike *Shaffer*, there were significant contacts between [Bosch GmbH], the State of Delaware, and the litigation. [Bosch GmbH] came into the State of Delaware to create, under the Delaware Corporation Law, a subsidiary corporation for the purpose of implementing its contract with [Borg-Warner] and accomplishing its acquisition of [Borg-Warner] stock. [Bosch GmbH] utilized the benefits and advantages of Delaware's Corporation Law for the creation of [Bosch N.A.] to be the vehicle for channeling to [Borg-Warner] the purchase money for the [Borg-Warner] stock and for becoming the recipient of the [Borg-Warner] stock. It is reasonable to assume that

> [Bosch GmbH] saw benefits and advantages in purposefully selecting the State of Delaware and utilizing its laws, above all others, for the creation of [Bosch N.A.] in the execution of its agreement with [Borg-Warner]. We conclude that [Bosch GmbH's] ownership of [Bosch N.A.] stock was the result of [Bosch GmbH's] purposeful activity in Delaware as an integral component of its total transaction with [Borg-Warner] to which the plaintiff's instant cause of action relates (9a-10a).

The Court then held there was a "controlling distinction . . . between the ownership of shares of stock acquired by purchase or grant as in *Shaffer* . . . and ownership arising from the purposeful utilization of the benefits and protections of the Delaware Corporation Law in activities related to the underlying cause of action" (11a). Finally, the Court concluded that "basic considerations of fairness" dictated its conclusion that Delaware courts had *in personam* jurisdiction over Bosch GmbH in that respondent was an individual of limited means and might not be able to afford litigation in West Germany, the only other forum suggested, and Delaware was the only forum where both defendants could be sued (12a).*

B. *Analysis of the Delaware Supreme Court Opinion*

The opinion of the Delaware Supreme Court does not explain the manner in which the invocation by Bosch GmbH of the benefits and protection of the Delaware Cor-

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* In coming to this conclusion, the Court did not consider whether respondent could have brought suit in Illinois, the forum where the acquisition of the Borg-Warner stock took place and the principal place of business of Bosch N.A. Additionally, the Court did not consider whether respondent had any necessity for joining Bosch N.A., not a party to his finder's fee agreement, as a defendant in his suit against Bosch GmbH.

poration Law relates to respondent's cause of action. Respondent has never claimed that Bosch GmbH used Delaware Corporation Law in any way to shield itself from liability to respondent, and the use of Delaware Corporation Law is of no relevance to the defense of Bosch GmbH to respondent's claim.* Respondent's claim arises from his finder's fee agreement with Bosch GmbH and from the subsequent agreement by Bosch GmbH to purchase the Borg-Warner shares, not from the fact that Bosch GmbH formed a subsidiary allegedly to effectuate that purchase. Thus, the incorporation of Bosch N.A. and the subsequent assignment to it of the right to purchase the Borg-Warner shares bear only an incidental relationship to respondent's cause of action.

The Delaware Supreme Court opinion also fails to state any interest Delaware might have in assuming *in personam* jurisdiction over Bosch GmbH. This action will not involve the interpretation of the Delaware Corporation Law, or indeed, of any Delaware law at all.** Furthermore, while the decision makes reference to the alleged hardships imposed on respondent should he be forced to litigate in West Germany, respondent is not a citizen of Delaware and has no apparent ties with that state. Respondent is a West German national and it was his business dealings there which gave rise, at least in part, to the present cause of action. Delaware simply has no cognizable state interest in providing this plaintiff with a forum against Bosch GmbH.

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*By its express terms, the finder's fee agreement applies to acquisitions made by "subsidiaries or affiliates" of Bosch GmbH as well as acquisitions by Bosch GmbH itself.

**In fact, as was noted in the opinion of the Superior Court, it is likely that the law of West Germany will apply to a substantial portion of this action (21a).

Finally, the decision of the Delaware Supreme Court ignores the separate corporate forms of Bosch GmbH and Bosch N.A. in concluding that a state court can take *in personam* jurisdiction over an alien corporation solely on the ground that the cause of action sued upon appears to relate to a particular corporate purpose of a domestic subsidiary, regardless of whether or not the subsidiary is an "alter ego" of its foreign parent or is in fact independently run.* Indeed, under the decision of the Delaware Supreme Court, Delaware courts may now claim *in personam* jurisdiction over all foreign corporations who use its corporation laws to form subsidiary corporations whenever a particular cause of action appears to relate to one of the purposes for which such a subsidiary is formed, even if

(a) plaintiff is not a resident of and has no ties with the State of Delaware;

(b) the cause of action sued upon has no other connection with the State of Delaware;

(c) such subsidiary in fact transacts no business in the State of Delaware and has no tie to that state other than its incorporation there; and

(d) no showing has been made that such subsidiary is the "alter ego" of its parent.

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*In the lower courts, respondent stated he would not rely on an "alter ego" theory in arguing that Delaware had jurisdiction over Bosch GmbH.

Reasons for Granting the Writ

A. *The judgment of the Supreme Court of Delaware conflicts with recent decisions of this Court.*

In its recent decision in *World-Wide Volkswagen Corp.* v. *Woodson,* —— U.S. ——, 100 S.Ct. 559, 567 (1980), this Court held that an important purpose of the Due Process Clause of the Fourteenth Amendment in defining the reach of the *in personam* jurisdiction of our state courts is to provide "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." The present decision of the Delaware Supreme Court, in finding that *in personam* jurisdiction over a foreign corporation may be premised solely on the "purposeful act" of that corporation in forming a Delaware subsidiary, nullifies that holding by penalizing foreign investors for seeking the very protection the Delaware Corporation Law invites them to seek,* without providing any rationale for disregarding the separate corporate forms of Bosch GmbH and Bosch N.A. Surely, in today's climate, when our government is seeking to encourage the creation of investment capital and new jobs in this country, foreign corporations seeking to invest in the United States are entitled to know more precisely the circumstances under which their formation of a domestic subsidiary will subject them to the *in personam* jurisdiction of our state courts.

* It is Delaware's public policy as expressed by its legislature "to maintain a favorable business climate and to encourage corporations to make Delaware their domicile . . . ." Law of December 31, 1963, v. 54, ch. 218 [1963] Del. Laws 724, cited in "Law for Sale: A Study of the Delaware Corporation Law of 1967," 117 *Univ. of Pa. L. Rev.* 861 (1969).

The Delaware Supreme Court justified its decision only on the ground that the purpose for which the Delaware subsidiary was formed bears some relationship to respondent's finder's fee claim. The nature of that relationship, however, is so incidental that the exercise of *in personam* jurisdiction by the Delaware court over Bosch GmbH conflicts with prior Supreme Court decisions in this area, including the recent decisions in *Rush* v. *Savchuk,* —— U.S. ——, 100 S.Ct. 571 (1980), *World-Wide Volkswagen Corp.*, and *Shaffer.*

B. *The Delaware Court's exercise of in personam jurisdiction over Bosch GmbH may not be premised on its incorporation of a subsidiary in Delaware, where such incorporation is only incidentally related to respondent's cause of action.*

Much has been written over the course of the years concerning the "minimum contacts" test first set forth in *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945)* and the analogous test set forth by this Court in *Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958), that before a party can be subject to the *in personam* jurisdiction of our state courts, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The *Shaffer* decision makes it clear, however, that jurisdiction cannot be premised on a mere "purposeful act" in the forum state: rather, the determination of *in personam* jurisdiction de-

* This test is as follows:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Id.* 316.

pends on "the relationship among the defendant, the forum, *and the litigation,*" 433 U.S. at 204 (emphasis added).

In the instant action, the sole contact Bosch GmbH had with Delaware was the formation of a Delaware subsidiary, a contact which in itself is clearly an insufficient basis on which to premise personal jurisdiction over Bosch GmbH. Furthermore, this contact is the only contact which Delaware has with the litigation: neither respondent, nor the cause of action sued upon, nor the Delaware subsidiary of Bosch GmbH has any other connection with that state. Nevertheless, the Delaware Supreme Court concluded that the *Shaffer* test had been met because there was some relationship between the purpose for which the Delaware subsidiary was formed and the cause of action sued upon.

This conclusion of the Delaware Supreme Court leads to the following question: absent some independent basis for the exercise of *in personam* jurisdiction,* and assuming no other connection between the forum and the litigation, must a defendant's contact with the forum state and his resulting invocation of the benefits and protections of its laws be more than incidentally related to the plaintiff's claim?

The clear implication of the decisions reached by this Court in *International Shoe* and its progeny, including the recent decision in *Rush,* is that, at least in the absence

* Thus, a state has unquestioned power over its own residents. *Pennoyer* v. *Neff,* 95 U.S. 714, 722 (1877). Additionally, in *International Shoe,* this Court noted that "there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities," 326 U.S. at 318. The instant case, however, concerns only the "minimum contacts" theory set forth in *International Shoe* and does not raise any issues relevant to the foregoing passage.

of a compelling state interest in favor of the assertion of *in personam* jurisdiction, such jurisdiction must be based on an act done in the forum state which bears a substantial—not merely an incidental—relation to the cause of action sued upon. Thus, in *International Shoe,* this Court found that

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue, 326 U.S. at 319.

Similarly, in *McGee* v. *International Life Ins. Co.,* 355 U.S. 220, 223 (1957), the exercise of *in personam* jurisdiction by the California courts in that instance was proper in that "the suit was based on a contract which had substantial connection with that State." Conversely in *Hanson* v. *Denckla,* 357 U.S. at 251, the exercise of *in personam* jurisdiction by the Florida courts was not consistent with the Due Process Clause, in part because, unlike *McGee,* the cause of action sued upon was not one that arose out of "an act done or transaction consummated in the forum State."

In the instant action, the only contact between Bosch GmbH and the State of Delaware which the Delaware Supreme Court cites in support for the exercise of *in personam* jurisdiction by Delaware's courts over Bosch GmbH is the formation "under the Delaware Corporation Law, [of] a subsidiary corporation for the purpose of implementing its contract with [Borg-Warner] and ac-

complishing its acquisition of [Borg-Warner] stock" (9a). Even if the foregoing statement were an accurate assessment of the purposes for which Bosch N.A. was formed,* it is obvious that the cause of action asserted against Bosch GmbH did not arise out of the act of incorporating Bosch N.A., but rather arose out of respondent's finder's fee agreement with Bosch GmbH. At most, the use of Delaware Corporation Law for the incorporation of Bosch N.A. played but an incidental role in the events leading up to this lawsuit, and the benefits and protection of the Delaware Corporation Law enjoyed by Bosch GmbH as a shareholder of Bosch N.A. did not give rise to the alleged obligations sued upon herein.

In its recent opinion in *Rush,* this Court refused to find that an incidental connection between the forum and the litigation, *i.e.,* an insurance policy said to be located in the forum state of Minnesota through the presence there of the defendant insurance company, was a significant contact for jurisdictional purposes. Disputing the conclusion of the Minnesota Supreme Court that such property was "intimately related" to the litigation, this court found that the policy was "not the subject matter of the case"; nor did it relate to the "operative facts" of plaintiff's cause of action, 100 S.Ct. 575, 578.

In the present action, the incorporation of Bosch N.A. in Delaware is not the subject matter of this action; nor can it be considered a fact in any way material to respondent's claim. Thus, while the incorporation of Bosch N.A. in Delaware may bear an incidental relationship to the cause of action sued upon, in the absence of any other connection between Delaware and this litigation, such

* In fact, as the Delaware Supreme Court noted elsewhere, Bosch N.A. was created for the purpose of managing various Bosch investments, not just that made in Borg-Warner (5a, 12a).

contact is not of sufficient relevance to the merits of respondent's claim to justify the subjection of Bosch GmbH to the *in personam* jurisdiction of Delaware's courts.

C. *The Delaware Court's exercise of* in personam *jurisdiction over Bosch GmbH is not in accord with due process in that Delaware has no state interest to protect in taking such jurisdiction.*

Equally significant in connection with the present petition is the second ground on which this Court distinguished *Hanson* from *McGee,* namely that in *McGee,* the State of California had a substantial state interest in assuming jurisdiction over the controversy therein at issue, *i.e.,* California had enacted special legislation to exercise its "'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional," *Hanson* v. *Denckla,* 357 U.S. at 252. It was in the context of that "manifest interest" of a state in the welfare of its residents that this Court in *McGee* concluded that in certain instances, states might be justified in offering *their own residents* a local forum.

In the present action, and unlike its previous decision in *Greyhound Corp.* v. *Heitner,* 361 A.2d 225 (Del. 1976) which was reversed by this Court in *Shaffer,* the Delaware Supreme Court has offered no reason for concluding that Delaware has any "manifest interest"—indeed, any state interest at all—to protect in taking jurisdiction over this matter.* While conceivably Delaware might have an inter-

* In its decision in *Greyhound* v. *Heitner,* the Delaware Supreme Court affirmed the lower court's finding of *in personam* jurisdiction over non-resident directors in a shareholder's derivative suit in part on the basis of Delaware's interest in adjudicating claims of mismanagement of a Delaware corporation, *Shaffer* v. *Heitner,* 433 U.S. at 194. This Court, however, refused to find that interest sufficient for the exercise of *in personam* jurisdiction in the absence of any forum contacts on the part of the non-resident directors, *id.*

est in insuring that its corporation laws are not misused, no allegation has been made herein that Bosch N.A. was formed for other than wholly proper purposes. Neither party claims that the incorporation of Bosch N.A. and its subsequent assumption of the right to purchase the Borg-Warner shares in any manner affects the alleged obligations of Bosch GmbH to respondent, and it is clear that no issue of Delaware law will be raised in the instant action.*

Finally, Delaware can have no recognizable state interest in providing a non-resident with a forum, a conclusion particularly apt in the circumstances of the present case where respondent is a West German national and solicited the consent of Bosch GmbH to his finder's fee agreement in West Germany.** The absence of a valid state inter-

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215-16. In view of this Court's decision in *Shaffer,* the exercise of *in personam* jurisdiction by the Delaware court in the present action seems particularly inappropriate where the Delaware Supreme Court has not even articulated any cognizable Delaware interest in asserting such jurisdiction.

* Thus, the instant decision is in sharp contrast to the decisions in *U. S. Industries, Inc.* v. *Gregg,* 540 F.2d 142 (3rd Cir. 1976), *cert. denied,* 433 U.S. 908 (1977), and *Barber-Greene Co.* v. *Walco Nat. Corp.,* 428 F. Supp. 567 (D. Del. 1977), involving diversity actions decided by federal courts in Delaware. Both *U. S. Industries* and *Barber-Greene* involved fraud charges in connection with the sale of the stock of Delaware corporations, presumably a matter of some interest to Delaware. Nevertheless, the courts in both cases refused to find that *in personam* jurisdiction over the non-resident defendant shareholders existed.

** The Delaware Supreme Court based its decision in part on the "unfairness" of making respondent litigate in West Germany (12a). However, Article VI, Pt. 1 of the Treaty of Friendship, Commerce and Navigation, October 29, 1954, United States—West Germany, 7 U.S.T. 1839, T.I.A.S. 3593, requires in effect, that German companies be accorded by United States courts the same treatment given United States companies in "all degrees of jurisdiction . . . in defense of their rights." Thus, to the extent that the Delaware Supreme Court may have relied on the alien status of Bosch GmbH in its discussion of "fairness" in this matter, such reliance was in violation of this treaty.

est, therefore, provides yet another reason why the exercise of *in personam* jurisdiction over Bosch GmbH in this action is not in accord with due process.

D. *The Delaware Supreme Court's exercise of* in personam *jurisdiction over Bosch GmbH may not be premised on its incorporation of a subsidiary in Delaware where there are no facts to justify disregard of their separate corporate identities.*

In *Rush,* this Court held that while the parties' relationship to each other might be significant in evaluating their ties to the forum, the requirements of *International Shoe* "*must be met as to each defendant* over whom a state court exercises jurisdiction," 100 S.Ct. at 579 (emphasis added). In finding jurisdiction in this case, the Delaware Supreme Court's decision is in conflict with *Rush* and the law applicable to those circumstances in which a state court may properly take *in personam* jurisdiction over a foreign parent corporation on the basis of the forum ties of a subsidiary, including the decision of this Court in *Cannon Manufacturing Co.* v. *Cudahy Packing Co.,* 267 U.S. 333 (1925).

In *Cannon,* this Court addressed the issue of whether *in personam* jurisdiction over a foreign parent corporation could be premised on the fact that a subsidiary was doing business in the forum state. Despite the substantial number of facts evidencing the parent's extensive control over the subsidiary, *id.* 335, the Court concluded, in effect, that "corporate separation carefully maintained [cannot] be ignored in determining the existence of jurisdiction," *i.e.,* the "corporate separation, though perhaps merely formal, was real. It was not pure fiction." *Id.* 336, 337.

The clear import of *Cannon* is that by the establishment of a domestic subsidiary, a foreign corporation may properly choose not to submit itself to the jurisdiction of a particular state, *id.* 336; and accordingly, the courts of that

state may not exercise *in personam* jurisdiction over such foreign corporation on the basis of the forum ties of that subsidiary without reasonable grounds for disregarding their separate corporate forms. This Court's decision in *United States* v. *Scophony Corporation of America,* 333 U.S. 795 (1948) and a substantial number of subsequent decisions concerned with the same issue, *see, generally, Zenith Radio Corp.* v. *Matsushita Electrical Industrial Co.,* 402 F. Supp. 262, 318-329 (E.D. Pa. 1975) and the cases therein cited, implicitly reaffirm the importance of independence.*

The opinion of the Delaware Supreme Court in effect nullifies the *Cannon* doctrine that a foreign corporation may properly chose not to submit itself to the jurisdiction of the Courts of a particular state by forming a domestic subsidiary. In essence, that opinion holds that whenever a foreign entity uses Delaware Corporation Law and forms a Delaware corporation for a particular purpose, that entity submits *itself* to the jurisdiction of Delaware's courts in any suit which appears to have some relation to that purpose, regardless of whether any showing has been made that the separate corporate form of the Delaware company has been abused. Furthermore, if left standing, that opinion will subject the foreign parent to suit in Delaware even where a) the cause of action sued upon has no other relationship to Delaware; b) the Delaware subsidiary has no other connection with that state, and c) the plaintiff has no ties with Delaware.

* *Scophony* restricted the scope of the *Cannon* doctrine, at least in antitrust actions, by holding that a foreign corporation could not rely on mere formal separation from its subsidiary to avoid being subject to suit *if* it were demonstrated that the foreign parent exercised continued supervision over and intervention in the affairs of a subsidiary transacting business in the forum "beyond normal exercise of shareholders' rights," 333 U.S. at 816. We cite *Cannon,* however, simply for the proposition that, contrary to the implication contained in the Delaware Supreme Court opinion, some factual basis must be demonstrated to justify the disregard of the separate corporate identities of parent and subsidiary before *in personam* jurisdiction over the parent can be based on the forum contacts of the subsidiary. The decision in *Scophony* amply supports this conclusion.

By the assertion of *in personam* jurisdiction over Bosch GmbH on the facts of this case, the Delaware Supreme Court opinion denies Bosch GmbH the basic protection supposedly offered by Delaware Corporation Law. Surely, this result is not in accord with the "fair and orderly administration of the laws" secured by the Due Process Clause of the Fourteenth Amendment, *International Shoe Co.* v. *Washington,* 326 U.S. at 319; nor does it give that "degree of predictability to the legal system" which will provide foreign corporations with some "minimum assurance as to where [their] conduct will and will not render them liable to suit," *World-Wide Volkswagen Corp.* v. *Woodson,* 100 S.Ct. at 567. For this additional reason, the decision of the Delaware Supreme Court is not in accord with due process.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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The Opinion of The Supreme Court of the State of Delaware

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 194, 1978

HELMUT A. PAPENDICK,

Plaintiff Below, Appellant,

v.

ROBERT BOSCH GmbH,

Defendant Below, Appellee.

Submitted: May 21, 1979
Decided: December 5, 1979

Before:

HERRMANN, *Chief Justice*,
DUFFY and QUILLEN, *Justices*.

Upon appeal from Superior Court. Reversed.

S. Samuel Arsht, David A. Drexler, George Pazuniak, of Morris, Nichols, Arsht & Tunnell, Wilmington, for plaintiff below, appellant.

Edward M. McNally, of Morris, James, Hitchens & Williams, Wilmington, and Joseph A. McManus, Brian E. McGunigle, James Bautz Bonnano, of Coudert Brothers, New York, Of Counsel, for defendant below, appellee.

The Opinion of the Supreme Court of the State of Delaware

HERRMANN, *Chief Justice*:

In this breach of contract action to recover a finder's fee for the acquisition of certain shares of stock, the Superior Court dismissed the plaintiff's action on the ground that, under *Shaffer* v. *Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), the defendant, Robert Bosch GmbH (hereinafter "RB"), lacked the "minimum contacts" necessary for the courts of this State to assert jurisdiction over it or its property in this State. *Papendick* v. *Bosch,* Del. Super., 389 A.2d 1315 (1979). We disagree and reverse.

I.

The plaintiff, Helmut A. Papendick, has been a permanent resident alien of the United States since 1966, residing in the State of Maryland at the time this action was brought and now residing in New Jersey. He no longer maintains a residence or any continuous contact with West Germany, his former country of residence.

The defendants are RB, a limited liability company created under the laws of the Federal Republic of Germany, and Robert Bosch North America Incorporated (hereinafter "RBNA"), a Delaware Corporation. RBNA was served personally, whereas service on RB was by notice and attachment of its interests in RBNA stock under 10 *Del.C.* § 3507* and 8 *Del.C.* § 169.** RBNA answered the com-

* 10 *Del.C.* § 3507 provides:

"§ 3507. Foreign attachment against foreign corporations.

"A writ of foreign attachment may be issued against any corporation, aggregate or sole, not created by or existing under the laws of this State upon proof satisfactory to the court that the defendant is a corporation not created by, or existing under the laws

The Opinion of the Supreme Court of the State of Delaware

plaint, but RB appeared specially and moved to quash process and to dismiss the complaint on the ground of lack of jurisdiction under *Shaffer.* The Superior Court sustained RB's contention and dismissed the action against it. 389 A.2d at 1315. The plaintiff appealed and this Court accepted the interlocutory appeal under Supreme Court Rule 42.

II.

This action is based upon the following assertions:

In 1975, the plaintiff sent to Rudolf Scharpff, a senior executive of RB and member of its Board of Management, a form of "finders fee agreement," along with a letter informing Scharpff that the plaintiff knew of a company that RB would be interested in acquiring and requesting RB to execute the agreement and return it to him. Scharpff did so and, thereafter, the plaintiff disclosed the name of the Borg-Warner Corporation ("B-W"), or its subsidiaries, as likely acquisition candidates for RB. The plaintiff then contacted B-W and negotiations between it and RB followed, resulting in an agreement between the two companies for the sale and purchase of B-W stock.

of this State, and that the plaintiff has a good cause of action against the defendant in an amount exceeding $50."

** 8 *Del.C.* § 169 provides:

"§ 169. Situs of ownership of stock.

"For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."

A formal contract between RB and B-W was executed on January 11, 1977, providing that RB would purchase and acquire from B-W, and that B-W would issue and sell to RB or its assignee, 2 million shares of common stock of B-W for the price of $62.9 million.

Just eight days earlier, on January 3, 1977, RB incorporated under the laws of the State of Delaware a corporation entitled "New American Investment Corporation", having for one of its explicit purposes the function of serving as a vehicle for the acquisition of the B-W stock here involved. On February 8, 1977, the name of that corporation was changed to RBNA. Two days later, on February 10, RBNA was designated by RB as the assignee of the 2 million shares of B-W stock purchased under the B-W/RB agreement of January 11. The sale was consummated and the shares were transferred to RBNA on February 16, 1977. RBNA is wholly owned by RB.

By letter to RB dated March 15, 1977, the plaintiff requested payment of the finder's fee claimed to be due him under the finder's fee agreement in connection with the acquisition of the 2 million shares of B-W stock. RB rejected plaintiff's claim by letter of April 7, and this action was filed on May 17, 1977, naming both RB and RBNA as defendants.

RB is the parent company of the so-called "Bosch Group", the principal activities of which include the manufacture and sale of electric and electronic, mechanical and other equipment for motor vehicles, television and radio sets, power tools, domestic appliances, cine-cameras and projectors, television studio equipment and packaging machinery. The Bosch Group encompasses some 90 wholly-owned subsidiaries and affiliates by which RB does business

throughout the world. RB is also expending substantial sums of money in acquiring equity interests in various United States corporations,* a major acquisition being the 9.3% equity interest in B-W for $62.9 million, out of which the claim herein arose. RB products have been sent into Delaware; it is admitted that RB has derived substantial revenues from sales of its products in Delaware by wholly-owned subsidiaries managed by RBNA.

III.

The plaintiff contends** that: (1) the "minimum contacts" rule of *Shaffer* is inapplicable here because, by footnote 37 to the *Shaffer* opinion,*** the United States Supreme Court reserved decision on whether the existence of property within the forum is, in and of itself, a sufficient basis on which to assert jurisdiction if "no other forum" is available; (2) "no other forum" is to be interpreted as "no other American forum", and Fourteenth Amendment due process is not violated by the exercise of jurisdiction on the basis of the existence of property in the jurisdiction only when "no other American forum" exists in which to litigate the

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* Other purposes of RBNA were to manage RB investments in various other corporations, including other affiliates of the Bosch Group.

** It is conceded by the plaintiff that the *Shaffer* principles are applicable to actions commenced by foreign attachment as well as by sequestration. See opinion below, 389 A.2d at 1317. We so hold.

*** Plaintiffs' arguments (1) and (2) are based upon the cryptic statement in footnote 37 of *Shaffer* v. *Heitner*, 433 U.S. at 211, 97 S.Ct. at 2584, 53 L.Ed. 2d at 702:

> "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff."

claim; (3) the "minimum contacts" requirement is not applicable to foreign investors who have property located in the forum, particularly when that property is related to the cause of action; (4) "traditional notions of fair play and justice" are not offended by the exercise of jurisdiction over a defendant which has purposefully availed itself of the laws of a state to incorporate a subsidiary within the state, when that activity is related to the cause of action; and (5) an assertion of jurisdiction over the defendant in this case is required both by public policy and the defendant's contacts with this State.

The defendant RB, on the other hand, contends that: (1) this case is governed by the "minimum contacts" test enunciated in *International Shoe Co.* v. *Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945); (2) "no other forum", as delineated in footnote 37 of *Shaffer,* relates not to the lack of an American forum, but to the situation in which dismissal of the plaintiff's action would effectively leave the plaintiff without a means of redress against the defendant anywhere in the world; (3) the courts of West Germany are a more appropriate forum for this suit since both the plaintiff and the defendant are citizens of that country and West German law is likely to govern; (4) corporate and individual alien defendants are entitled to judicial due process including the minimum contacts jurisdictional requirement; and (5) "mere" ownership by RB of the stock of RBNA, which does not do business in Delaware and is not the "alter ego" of RB, is an insufficient contact upon which to assert jurisdiction.

IV.

We first consider plaintiff's fourth and fifth contentions and conclude that the "minimum contacts" test, and its

standard of "traditional notions of fair play and substantial justice," as established by *International Shoe Co.* v. *Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and applied in *Shaffer,* have been met sufficiently to sustain jurisdiction in Delaware in this case.

Under the rule of *Shaffer,* "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 433 U.S. at 212, 97 S.Ct. at 2585, 53 L.Ed.2d at 703. A restatement of those standards appear in *Kulko* v. *Superior Court of California, etc.,* 436 U.S. 84, 92, 98 S.Ct. 1690, 1697, 56 L.Ed.2d 132, 141 (1978), as follows:

> "[T]he constitutional standard for determining whether the State may enter a binding judgment against appellant here is that set forth in this Court's opinion in *International Shoe Co.* v. *Washington,* supra; that a defendant 'have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice.'" 326 U.S., at 316, 90 L.Ed. 95, 66 S.Ct. 154, 161 A.L.R. 1057, quoting *Milliken* v. *Meyer,* supra, at 463, 85 L.Ed. 278, 61 S.Ct. 339, 132 A.L.R. 1357. While the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are, of course, to be considered, see *McGee* v. *International Life Ins. Co.,* 355 U.S. 220, 223, 2 L.Ed.2d 223, 78 S.Ct. 199 (1957), an essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State. *International Shoe Co.* v. *Washington,* supra, at 316-317, 319, 90 L.Ed. 95, 66 S.Ct. 154, 161 A.L.R.

1057. Accord, *Shaffer* v. *Heitner,* supra, at 207-212, 53 L.Ed.2d 683, 97 S.Ct. 2569; *Perkins* v. *Benguet Mining Co.,* 342 U.S. 437, 445, 96 L.Ed. 485, 72 S.Ct. 413, 47 Ohio Ops. 216, 63 Ohio L. Abs. 146 (1952)."

But in *Kulko,** there is also set forth a *caveat* for the application of the *International Shoe* standards which deserves emphasis:

"Like any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present. *Hanson* v. *Denckla,* 357 U.S. 235, 246, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958). We recognize that this determination is one in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.' *Estin* v. *Estin,* 334 U.S. 541, 545, 92 L.Ed 1561, 68 S.Ct. 1213, 1 A.L.R.2d 1412 (1948)."

(436 U.S. at 92, 98 S.Ct. at 1697, 56 L.Ed.2d at 141). We approach the application of the *International Shoe* "minimum contacts" test to the facts of the instant case with that wise caveat in mind.

This is not, as RB argues, a case of "mere" ownership of stock having its situs in Delaware as was concluded in *Shaffer.* In *Shaffer,* the Court noted that with respect to the defendants in that case:

* *Kulko* followed *Shaffer,* and, like *Shaffer,* was authored by Mr. Justice Marshall.

"[The] property is not the subject matter of this litigation, nor is the underlying cause of action related to the property . . . Nor does [the appellee] identify any act related to his cause of action in Delaware."

413 U.S. at 213, 97 S.Ct. at 2585, 53 L.Ed.2d at 703. Moreover, the Court concluded that it had not been demonstrated that the

"appellants [had] 'purposefully avail[ed themselves] of the privilege of conducting activities in the forum State' . . . in a way that would justify bringing them before a Delaware tribunal. Appellants have simply had nothing to do with the State of Delaware . . . [A]ppellants had no reason to expect to be haled before a Delaware court."

413 U.S. at 216, 97 S.Ct. at 2586, 53 L.Ed.2d at 705 (citations omitted).

Here, unlike *Shaffer,* there were significant contacts between RB, the State of Delaware, and the litigation. RB came into the State of Delaware to create, under the Delaware Corporation Law, a subsidiary corporation for the purpose of implementing its contract with B-W and accomplishing its acquisition of B-W stock. RB utilized the benefits and advantages of Delaware's Corporation Law for the creation of RBNA to be the vehicle for channeling to B-W the purchase money for the B-W stock and for becoming the recipient of the B-W stock. It is reasonable to assume that RB saw benefits and advantages in purposefully selecting the State of Delaware and utilizing its laws, above all others, for the creation of RBNA in the execution of its agreement with B-W. We conclude that RB's ownership of

RBNA stock was the result of RB's purposeful activity in Delaware as an integral component of its total transaction with B-W to which the plaintiff's instant cause of action relates.

The distinctions between this case and *Shaffer* are manifest: Unlike *Shaffer*: (a) this is a case in which the "underlying cause of action [is] related to the property";* (b) this is not a case wherein the plaintiff failed to "identify any act related to his cause of action as having taken place in Delaware;" (c) this is not a case in which the defendant, having created a Delaware corporation as an integral part of the total transaction out of which this cause of action arose, had no reason to expect to be 'haled' before a Delaware court—indeed, as the sole owner of RBNA, this is a case in which it is conceivable that by reason of RBNA activities the defendant RB had, has, or will have reason to expect to avail itself of a Delaware court; (d) this is a case in which the defendant has "purposefully avail[ed itself]

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* Indeed, the *Shaffer* Court noted:

"It appears, therefore, that jurisdiction over many types of action which now are or might be brought *in rem* would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard. For the type of *quasi in rem* action typified by *Harris* v. *Balk* and the present case, however, accepting the proposed analysis would result in significant change. These are cases where the property which now serves as the basis for state-court jurisdiction is *completely unrelated* to the plaintiff's cause of action."

433 U.S. at 208-09, 97 S.Ct. at 2582, 53 L.Ed.2d at 700-701 (Emphasis added; footnotes omitted).

Since jurisdiction would properly be exercised in a case such as this under the prior jurisdictional theory, as delineated by *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877) and subsequent cases, the clear relationship of the property to the cause of action in this case is strong indicia of the propriety of an exercise of jurisdiction by the courts of this State.

of the privilege of conducting activities within the forum State * * * in a way that would justify bringing [it] before a Delaware tribunal;" and (e) manifestly, this is not a case wherein the defendant "simply had nothing to do with the State of Delaware."

We do not believe that the *International Shoe* "minimum contact" due process standards were intended to deprive Delaware courts of jurisdiction by permitting an alien corporation to come into this State to create a Delaware corporate subsidiary for the purpose of implementing a contract under the protection of and pursuant to powers granted by the laws of Delaware, and then be heard to say, in a suit arising from the very contract which the subsidiary was created to implement, that the only contact between it and Delaware is the "mere" ownership of stock of the subsidiary.

The latter point is most significant in applying *International Shoe* standards. There is a controlling distinction, for present purposes, between the ownership of shares of stock acquired by purchase or grant as in *Shaffer*, on the one hand, and ownership arising from the purposeful utilization of the benefits and protections of the Delaware Corporation Law in activities related to the underlying cause of action, on the other hand. RB purposefully availed itself of the benefits and protections of the laws of the State of Delaware for financial gain in activities related to the cause of action. Therein lies the "minimum contact" sufficient to sustain the jurisdiction of Delaware's courts over RB.

Both pre- and post-*Shaffer* decisions have sustained jurisdiction in cases in which the contacts with the forum were less than those present here: E.g., *Rosenblatt* v. *American Cynamid Co.*, 86 S.Ct. 1, 15 L.Ed.2d 392 (1965); *McGee* v.

International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); *Engineering Equipment Co.* v. *S.S. Selene*, S.D.N.Y., 446 F.Supp. 706 (1978).

Finally, "basic considerations of fairness point decisively" in favor of this State as the proper forum for the adjudication of this case. Compare *Kulko*, 436 U.S. at 97, 56 L.Ed.2d at 145, 98 S.Ct. at 1700. The plaintiff is an individual of limited means. Delaware is the only jurisdiction in which he can sue both RB and its subsidiary RBNA in one action, as here. The only other forum suggested for reaching RB is West Germany. The costs to the plaintiff of litigating in West Germany—including such expenses as additional legal fees, foreign depositions, translators, and travel expenses for himself and witnesses—may well be prohibitive and destructive of his "day in court".

The defendant, on the other hand, is a huge multi-national enterprise which purposefully acquired a $67.9 million equity interest via the incorporation of a Delaware subsidiary which it also utilizes to manage its other investments in domestic corporations. The corporate nature of the defendant and the commercial purpose of the transaction giving rise to the cause of action, alone, strongly support our conclusion that fairness and justice require jurisdiction to be asserted in Delaware under the totality of the circumstances of this case. Cf. *Shaffer* v. *Heitner*, 433 U.S. at 204, 97 S.Ct. at 2580, 53 L.Ed.2d at 698, n.19 (1977); *Kulko* v. *Superior Court of California*, 436 U.S. at 97, 101, 98 S.Ct. at 1699, 1702, 56 L.Ed. 2d at 144, 147 (1978).

This is a clear example of an alien corporation purposefully acting in this State to invoke "the benefits and protections" of Delaware laws. It is our conclusion that the "traditional notions of fair play and substantial justice"

can only be offended by refusing jurisdiction here and relegating the plaintiff to the duplicative pursuit of justice both in West Germany and in Delaware.

V.

Under the view we take of the "minimum contact" present in this case, we find it unnecessary for the disposition of this appeal to grapple with the question of whether, in its reference to "no other forum" in footnote 37, the *Shaffer* Court intended to say "no other forum in the United States" (as the plaintiff here argues) or "no other forum in all or certain other parts of the world" (as the defendant here argues and the Superior Court concluded, 389 A.2d at 1318). There is a growing contrariety of judicial opinion on this point in the comparatively short time since *Shaffer* was decided, e.g., *Louring* v. *Kuwait Boulder Shipping Co.*, D. Conn., 455 F.Supp. 630 (1977); *Majique Fashions Ltd.* v. *Warwick & Co.*, Ltd., N.Y. Supr. Ct., 409 N.Y.S.2d 581 (1978). We have no desire to enter unnecessarily into the growing judicial speculation as to its actual meaning and decline to do so in this case. We are content to await the Supreme Court's own interpretation of *Shaffer's* footnote 37.

Nor will we permit ourselves to yield to the plaintiff's importuning and become unnecessarily involved in important international policy decisions, based upon interpretations of *Shaffer*,* governing the rights and liabilities there-

*The plaintiff's basic premise for this connection is the following statement in the concurring opinion of Mr. Justice Stevens in *Shaffer*:

"If I visit another state, or acquire real estate or open a bank account in it, I knowingly assume some risk that the State will

under of the increasing number of alien corporations engaged in foreign investments in the United States and, as a result, owning property located within, and affecting people resident in, various state forums. These very significant questions, too, we leave for another day and another case.

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Reversed.

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exercise its power over my property or my person while there. My contact with the State, though minimal, gives rise to predictable risks.

"Perhaps the same consequences should flow from the purchase of stock of a corporation organized under the laws of a foreign nation, because to some limited extent one's property and affairs then become subject to the laws of the nation of domicile of the corporation. As a matter of international law, that suggestion might be acceptable because a foreign investment is sufficiently unusual to make it appropriate to require the investor to study the ramifications of his decision. But a purchase of securities in the domestic market is an entirely different matter." 433 U.S. at 218, 97 S.Ct. at 2587, 53 L.Ed. 2d at 706.

Opinion of the Superior Court of the State of Delaware

IN THE

SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HELMUT A. PAPENDICK,

Plaintiff,

VS.

ROBERT BOSCH GmbH and
ROBERT BOSCH NORTH AMERICA INCORPORATED,

Defendants.

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562 Civil Action 1977

Submitted: March 16, 1978
Decided: June 20, 1978

Upon Defendants' Motion to Dismiss. Granted.

EDMUND D. LYONS of Morris, James, Hitchens & Williams, Wilmington, and of Counsel: JOSEPH A. McMANUS and BRIAN E. McGUNIGLE of Coudert Brothers, New York, *for Plaintiff.*

S. SAMUEL ARSHT and DAVID A. DREXLER of Morris, Nichols, Arsht & Tunnell, Wilmington, *for Defendants.*

LONGOBARDI, *J.*

This is the Court's decision on the motion of the Defendant Robert Bosch Gmbh ("RB") to dismiss the complaint for lack of jurisdiction.

Plaintiff Helmut Papendick ("Papendick"), a West German citizen permanently residing in Maryland, brought

suit against RB and Robert Bosch North American, Inc. ("RBNA") to recover the finders fee he claims that they owe him in connection with the purchase by RBNA of two million shares of Borg-Warner common stock. RB is a West German corporation with its principal place of business in West Germany while RBNA, a wholly owned[1] subsidiary of RB, is a Delaware corporation with its principal place of business in Broadview, Illinois. The alleged jurisdiction over RBNA was acquired when service of process was made on RBNA's registered agent in Delaware by attaching the shares of stock RB owned in RBNA. The situs of that stock was in Delaware under the provisions of 8 *Del.C.* 169. Defendant RB has specially appeared to contest jurisdiction.

The threshold question that must be faced by this Court is whether *Shaffer* v. *Heitner,* —— U.S. ——, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) is applicable to the present case. In *Shaffer,* the United States Supreme Court held that when a state court attempted to acquire *quasi in rem* jurisdiction by sequestration (seizure) of stock owned by the Defendant, which by statute had its situs in that state, the presence of the stock alone was not sufficient to give the Court jurisdiction. Rather, the court must apply the test of "minimum contacts" as set forth in *International Shoe Co.* v. *State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

The case before this Court was commenced not by sequestration but by foreign attachment. The initial ques-

[1] At the time the suit was filed, RB owned 6.25% of the stock in RBNA with another wholly owned RB subsidiary, SIBA-Elektrik Gmbh ("SIBA"), owning the remaining 93.75%. At oral argument, RB indicated that it had acquired SIBA's interest in RBNA making RB the owner of 100% of the RBNA stock. Thus, at all times, RB was the owner, directly or indirectly, of RBNA.

tion whether *Shaffer,* which involved a case on sequestration, is applicable to a case involving attachment must be answered in the affirmative.

Even a cursory reading of *Shaffer* clearly indicates that it was establishing a general test for jurisdiction. An example of that is the following:

> ". . . all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." 97 S.Ct. 2584, 2585.

The present case is analogous to *Shaffer* in several respects. In both, the Plaintiffs used the statutory attachment provisions to acquire *quasi in rem* jurisdiction with the ultimate goal of receiving monetary relief. While denominated *quasi in rem,* the realities of the situation in both cases are that Defendants ultimately would be subjected to *in personam* liability. Thus, a general reading of the Supreme Court's opinion in *Shaffer* supports this Court's belief that the *Shaffer* holding is applicable to this case.

Even the particular facts of this case and the relationship between sequestration and foreign attachment compel this Court to decide that attachment process must meet the "minimum contacts" standard of *International Shoe.*

Foreign attachment derives from colonial times having first been enacted in 1770. *Blaustein* v. *Standard Oil Co.,* Del.Supr., 49 A.2d 726 (1946). Sequestration is of a more recent origin. In *Skinner* v. *Educational Pictures Securities Corporation,* Del.Ch., 129 A. 857 (1925), Chancery Court found that it did not have jurisdiction over a nonresident defendant because there was no equitable counterpart to foreign attachment. To remedy the situation, that court suggested that the Legislature had power to give

Chancery Court a method, similar to foreign attachment at law, for proceeding against non-resident defendants. The Legislature took the court's suggestion and in the next term of the General Assembly, the first sequestration statute was passed. 35 *Del.Laws* Ch. 215 (1927). Thus, sequestration was viewed as analogous to foreign attachment and interpretations of the sequestration statute were often made by referring to the policy that prevailed in foreign attachment. *Sands* v. *Lefcourt Realty Corporation,* Del.Supr., 117 A.2d 365 (1955). See also Folk and Mayer, *Sequestration in Delaware: A Constitutional Analysis,* 73 Col.L.Rev. 749, 751-753 (1973). In addition, while *Shaffer* dealt with the constitutionality of sequestration, many of the inequities that the Supreme Court noted were present in the sequestration process are also present in foreign attachment. Under either procedure, the non-resident defendant is compelled to enter a general appearance if he wants to defend the case on the merits; thus, an action which began as one of *quasi in rem* jurisdiction is quickly transformed into an action *in personam.* The non-resident defendant's liability is no longer limited to the value of the seized property; instead, he is subject to the same liability as though he had been personally served. Therefore, as the Supreme Court noted in *Shaffer,* the plaintiff was able to get jurisdiction over a non-resident defendant indirectly although constitutionally he could not have gotten jurisdiction over the defendant directly. 97 S.Ct. at 2583. Indicating its disapproval, the Supreme Court said:

> "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court

> jurisdiction that is fundamentally unfair to the defendant." 97 S.Ct. at 2584.

The historical connection between foreign attachment and sequestration and the existence of similar abuses under foreign attachment and sequestration mandate a finding that the proper test to be applied in determining whether this Court has jurisdiction is the "minimum contacts" test of *International Shoe.*

In deciding that *Shaffer* is applicable to the case at bar, the Court has considered Plaintiff's argument that the Supreme Court, by reason of the language set out in footnote 37 of its opinion, did not intend to have *Shaffer* apply to the present case. Footnote 37 states:

> "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." 97 S.Ct. at 2584, n. 37.

As a footnote, the statement must be viewed in the context of the main opinion. In that particular part of the opinion, the Supreme Court was discussing the effect its holding would have on *in rem* and *quasi in rem* actions. The court noted that the primary rationale for treating the presence of property as a sufficient basis for jurisdiction was to avoid the situation where a wrong-doer would remove his property to another state where he was not subject to *in personam* jurisdiction and thus avoid payment of his obligation. After responding to that argument, the Supreme Court then went on to say that another rationale for *in rem* jurisdiction was to ". . . avoid the uncertainty inherent in the International Shoe standard and assure a

plaintiff of a forum." The court followed that statement by footnote 37. When an action is an *in rem* proceeding, the most logical forum where the litigation can occur is the forum where the property is located. In the text of the main opinion, the Supreme Court went on to say:

> "We believe, however, that the fairness standard of International Shoe can be easily applied in the vast majority of cases. Moreover, when the existence of jurisdiction in a particular forum under International Shoe is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice.' That cost is too high." 97 S.Ct. at 2584.

Also of note is the Supreme Court's own reference to the article by *Folk and Mayer,* supra, where those commentators stated:

> "To the extent that a nonresident lacks minimum contacts with Delaware, it is questionable whether an important Delaware public interest is served by summarily seizing property to force a nonresident to appear generally. Indeed, it may be that Delaware cannot constitutionally extend its jurisdiction that far at least if plaintiff in such a case is also a nonresident."

In light of that context, it is clear that footnote 37 does not preclude this Court from following *Shaffer*. Plaintiff's argument that "no other forum" should be read to imply "no other American forum" is not convincing nor has Plaintiff shown that there is actually no forum, other than Delaware, where suit could be brought. At the very least, Plaintiff, a German national, would be able to bring suit against RB in West Germany. The availability of a foreign forum serves the goals of fair play and substantial justice. This is particularly true where the interpretation of the contract in dispute may well be governed by West German law. Certainly, the West German courts are better equipped to interpret their own law than any American court.

Having determined that the "minimum contacts" test of *International Shoe* must govern the determination by this Court as to whether it has jurisdiction over RB, the contact of RB with this forum must be evaluated.

The "minimum contacts" test of *International Shoe* depends on the qualitative rather than quantative nature of the contacts. In *International Shoe,* the Supreme Court stated:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."

In testing the qualitative nature of the contacts, the relationship between the Defendant, the forum and the litigation are the central concern. 97 S.Ct. at 2580.

From a review of the contacts between Defendant, the forum and the litigation, it is apparent that RB does not have sufficient contacts with the State of Delaware to require it to be subject to the jurisdiction of this Court.

RB is a foreign corporation. Its officers, directors and other employees have never had any contact with this State. The litigation which is presently before the Court involves a contract that was entered into between a Maryland resident and a West German citizen. The contract was not entered into in Delaware. RB does own stock in a Delaware corporation, RBNA, but the ownership of that stock

has no relevance to the present litigation and the mere incorporation of a subsidiary corporation in Delaware does not create a sufficient contact with the State to expose RB to a situation which could amount to *in personam* liability. It is interesting to note that the Supreme Court impliedly rejected the argument that incorporation in Delaware "invokes the benefits and protections of its laws" (citing *Hanson* v. *Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.E.2d 1283 [1958]) for that theory appears in the concurring and dissenting opinion of Justice Brennan, 97 S.Ct. at 2592. RB's sole contact with Delaware is the ownership of stock in RBNA after utilizing the incorporation laws of this State. Although the use of our incorporation laws may be a factor to be qualitatively weighed with all other factors, it is in fact the *sine qua non* for the situs of the stock in this State.

To decide that incorporation is qualitatively sufficient is not different from holding that the presence of the stock alone is enough to meet constitutional standards for jurisdiction. Such sophistry flies in the face of the practical application of the "minimum contact" standard because in this case there could be no argument for jurisdiction based on the situs of the stock unless incorporation had occurred in this State.

The Court is mindful also of the case of *Arden-Mayfair, Inc.* v. *Louart Corporation,* Del.Ch., 385 A.2d 3 (1978). Though that case started by sequestration involved a proceeding to clarify and enforce voting rights without monetary relief and in that respect was different, it nevertheless recognized the applicability of *Shaffer* to those proceedings.

RB's motion to dismiss is granted.

IT IS SO ORDERED.

Supreme Court, U. S.
FILED
MAR 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

Docket No. 79-1353

ROBERT BOSCH, GmbH,

Petitioner,

v.

HELMUT A. PAPENDICK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DOCKET NO. 79-1353.

ROBERT BOSCH, GMBH,

Petitioner,

v.

HELMUT A. PAPENDICK,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

REASONS FOR DENYING THE WRIT.[1]

Robert Bosch GmbH's petition for a writ of certiorari presents a routine question of the application to particular facts of the legal principles concerning assertion of state court jurisdiction which have been developed at length by this Court in a series of recent opinions.[2] The opinion of the Delaware Supreme Court herein represents a diligent, thoughtful and patently correct application of these principles. It represents no extension of, departure from or conflict with any decision of this Court. No legally relevant purpose will be served by this Court's examination

1. Citations to materials in Bosch's petition and the opinions below set forth in its appendix will be made to the appropriate page number as follows: (Pet. —). The decision below is reported, *Papendick v. Robert Bosch GmbH*, 410 A. 2d 148 (Del. Supr. Ct. 1979).

2. *International Shoe Co. v. Washington*, 326 U. S. 310 (1945); *Shaffer v. Heitner*, 433 U. S. 186 (1977); *Kulko v. Superior Ct. of Calif.*, 436 U. S. 84 (1978); *McGee v. International Life Ins. Co.*, 355 U. S. 220 (1957); *Hanson v. Denckla*, 357 U. S. 235 (1958); *World-Wide Volkswagen Corp. v. Woodson*, — U. S. —, 100 S. Ct. 559 (1980) and *Rush v. Savchuk*, — U. S. —, 100 S. Ct. 571 (1980).

of either petitioner's quarrel with the factual findings upon which the Delaware Court premised its assertion of jurisdiction or its challenge to the legal principles carefully defined in recent decisions. The Petition should be denied.

FACTS.

The facts are simply stated. Plaintiff, a permanent U. S. resident, entered into a contract via the mails with Bosch GmbH, a West German entity, in which Bosch GmbH promised to pay him a "finder's fee" if it concluded an acquisition transaction with Borg-Warner Corporation, an American company. On the eve of entering into such acquisition transaction, Bosch GmbH caused a wholly-owned Delaware corporation, Bosch N. A., to be formed, "having for one of its explicit purposes the function of serving as a vehicle for the acquisition of the [Borg-Warner] stock" (Pet. 4a). It then assigned its acquisition rights with Borg-Warner to Bosch N. A. and provided it with the funds needed to complete the transaction. After his claim for fee was rejected by Bosch GmbH, plaintiff brought suit in Delaware against Bosch GmbH and Bosch N. A. Bosch N. A. was served in Delaware by summons delivered to its registered agent. Jurisdiction over Bosch GmbH was sought by attachment of its stock in Bosch N. A., a procedure authorized by Delaware statutes.[3] Upon these premises, none of which is disputed, the Delaware Supreme Court found:

3. In its petition Bosch GmbH repeatedly states that Delaware is attempting to assert *in personam* jurisdiction over it. Actually, until it entered its general appearance after remand below, the jurisdiction was *quasi in rem*. The error is not material. We agree that under *Shaffer v. Heitner, supra,* the standards to test the two different bases for jurisdiction are substantively the same, viz. "minimum contacts", although it surely can be argued that the creation of a subsidiary and the continued ownership of its stock provide a far greater "contact" with the jurisdiction than an isolated single transaction such as was found to support *in personam* jurisdiction in *McGee v. International Life Ins. Co., supra.*

> "That [Bosch GmbH's] ownership of [Bosch N. A.] stock was the result of [Bosch GmbH's] purposeful activity in Delaware *as an integral component* of its total transaction with [Borg-Warner] to which plaintiff's instant cause of action relates (Pet. 9a-10a)."

Upon this factual finding, the Delaware Supreme Court concluded that Bosch GmbH had sufficient "minimum contacts" with Delaware to support jurisdiction (Pet. 9a-11a). It buttressed its conclusion by testing it against *International Shoe's* "traditional notions of fair play and substantial justice" as restated in *Shaffer, supra,* and *Kulko, supra* (Pet. 11a-13a). Chief Justice Herrmann concluded that Delaware's assertion of jurisdiction over Bosch GmbH met all appropriate standards, especially when laid alongside the *only* alternative presented by petitioner—a duplicative prosecution in both West Germany and Delaware against a huge multi-national corporation and its wholly-owned subsidiary by plaintiff, an individual of limited means, arising out of a transaction which was almost entirely American in its nature and consequences (Pet. 12a-13a).

A. The Decision Below Does Not Conflict With Any Decision of This Court.

Petitioner contends that the decision below conflicts with *Shaffer v. Heitner, supra,* and the subsequently decided cases of *World-Wide Volkswagen Corp. v. Woodson, supra,* and *Rush v. Savchuk, supra.* However, upon analysis, petitioner's "conflict" is merely that the Court below reached a different conclusion from these cases based upon the different facts of this case.

A reading of Chief Justice Herrmann's opinion puts to rest any contention that the decision conflicts with *Shaffer.* The opinion carefully and at length considers

Shaffer and points out in meticulous detail the key differences which compelled the different result in the present case. Petitioner does not, nor can it, point to a single concept set out in *Shaffer* that was ignored or contravened, let alone demonstrate any disregard of its overriding principles.

Nor does petitioner point to any conflict between the decision below and *Rush v. Savchuk, supra.* A halfhearted stab is made, however, at asserting a conflict with *Rush's* companion case, *World-Wide Volkswagen Corp. v. Woodson, supra.* However, even a cursory analysis requires its rejection.

Woodson involved a claim of jurisdiction in Oklahoma over the New York-based distributors of an allegedly defective automobile who had "carr[ied] on no activity whatsoever in Oklahoma . . . and . . . avail[ed] themselves of none of the privileges and benefits of Oklahoma law" (100 S. Ct. at 566). In a suit for damages arising from injuries suffered when the car, sold to New Yorkers in New York, was "fortuitously" involved in an accident while transiting Oklahoma, this Court was called upon to test Oklahoma's claim of jurisdiction over the New York sellers. The assertion of Oklahoma jurisdiction over the party whose position is analogous to that of the present petitioner—the West German manufacturer of the automobile who had, presumably, purposefully caused similar cars to be sold in Oklahoma—was not deemed to be questionable enough to challenge in this Court. Mr. Justice White reviewed the teachings of the earlier decisions in a manner substantively parallel to that of Chief Justice Herrmann herein.[4] And he expressed his relevant conclusion in remarkably similar terms (100 S. Ct. at 567):

4. In the context of the particular question presented to him which involved suit against New York corporations, Mr. Justice White considered as a relevant test for assertion of a particular state court jurisdiction, a comparison with other jurisdictions within

> "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' *Hanson v. Denckla, supra,* at 253, 78 S. Ct., at 1240, it has clear notice that it is subject to suit there. . . ."

Of course, the finding that no such purposeful activity by the *Woodson* defendants had occurred required dismissal of the action. Hence, given the difference in the crucial underlying facts, *Woodson* is totally consistent with the decision below.

B. Incorporating Bosch N. A. in Delaware Constitutes a Sufficient "Minimum Contact", and Defendant's Contrary Argument Represents an Unwarranted Extension of Existing Law.

Petitioner's second argument is based upon two propositions which are invalid on their face. Firstly, its contention that Bosch GmbH's contacts with Delaware were "only incidentally related" to the cause of action flies in the face of the Delaware court's finding, amply supported, that Bosch GmbH's purposeful activity in Delaware (the incorporation of Bosch N. A.) was an "*integral component* of its total transaction to which the cause of action relates" (Pet. 9a-10a) (emphasis added) and, as such, constituted the "minimum contact" with Delaware required by *International Shoe* and *Shaffer.*

4. (Cont'd.)
the "interstate judicial system", 100 S. Ct. at 564. In an effort to find shelter under this umbrella, petitioner hints at other potential American jurisdictions (Pet. 4, 7). However, in the court below, petitioner offered only West Germany as an alternative forum. In all events, Mr. Justice White's analysis in this respect is patently not directed at situations where the alternative jurisdiction is not one encompassed within "our federal system of government" (100 S. Ct. at 565). Cf. Concurring opinion of Mr. Justice Stevens in *Shaffer v. Heitner,* 433 U. S. at 218.

From this fallacious premise, petitioner leaps to the rather startling conclusion that *Shaffer* overruled or modified the apparent holding of *Hanson v. Denckla, supra,* that the commission of an "act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws" (357 U. S. at 253), provides a proper basis for jurisdiction over him. Suffice to say, this interpretation of *Shaffer* is fully refuted by *Woodson, supra,* where, as noted above, Mr. Justice White quoted with patent approval the very language of *Hanson v. Denckla, supra,* which petitioner says *Shaffer* overruled.

The unifying thread in *Hanson v. Denckla, Shaffer v. Heitner, Kulko v. California Superior Ct., World-Wide Volkswagen Corp. v. Woodson* and *Rush v. Savchuk,* is that in each of them the defendant had conducted no purposeful activity whatsoever within the forum state, let alone a purposeful act either integrally or, arguably, only incidentally related to the cause of action before the court. Where purposeful acts have occurred, jurisdiction has been upheld. See *e.g. International Shoe Co. v. Washington, supra, McGee v. International Life Ins. Co., supra,* and *Perkins v. Benguet Mining Co.,* 342 U. S. 437 (1952). Hence, acceptance of petitioner's position requires an unwarranted extension of existing law far beyond that enunciated in any prior decision of this Court.

C. There Is an Interest in Delaware, as Indeed, in Every State, in Affording a Remedy for Redress of Civil Wrongs.

Petitioner's third argument is based upon the alleged lack of an interest in Delaware, *qua* Delaware, in the resolution of this dispute. This contention ignores the proposition, recognized most recently in *Woodson,* 100 S. Ct. at 564, but implicit in *International Shoe* and all of its progeny, that every state has a distinct, viable interest in affording its citizens—and by extension under the equal protection clause, the citizens of other states—a forum for obtaining redress of civil wrongs. Granting a forum for such redress at the plaintiff's election is itself a compelling state interest, unless in the context of a particular controversy the defendant lacks "minimum contacts" with the jurisdiction so as to make the assertion of jurisdiction violative of traditional notions of fair play and substantial justice.

Petitioner's argument is merely an inversion of the contention expressly rejected in both *Shaffer* and *Kulko,* that the presence of some nebulous independent state interest, either in the applicability of its substantive law or a need to supervise institutions created under its laws, is sufficient to support jurisdiction even where minimum contacts with the defendant are lacking or fair play is violated. Petitioner necessarily urges this Court to forge a rule that even where, as here, "minimum contacts" are present and fair play and substantive justice support jurisdiction, jurisdiction must still be rejected unless some independent state interest in adjudicating the case is found. Thus, here too, petitioner is seeking from this Court an unwarranted and dubious extension of the authorities upon which it purports to rely.

D. Corporate Separateness or Identity Is Not in Issue Here.

That Bosch GmbH and Bosch N. A. may not be "alter egos" is beside the point, and no manner of semantic straining can turn this argument into an issue presented by this case. Respondent had never asked the court below to "pierce the corporate veil" *i.e.,* to equate Bosch N. A.'s

activities with those of Bosch GmbH, and the court below meticulously analyzed and relied upon Bosch GmbH's own activities in Delaware in reaching its conclusion. It is a misreading of the opinion below to suggest that jurisdiction over Bosch GmbH was based upon either Bosch N. A.'s jural existence in Delaware or the business which Bosch N. A. does there.

Indeed, the petition appears to have convoluted the concept upon which it relies. The issue of separate corporate identity generally arises in the context of an attempt to hold a parent liable for the activities of its subsidiaries—*e.g., Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U. S. 333 (1925). Here, both the underlying cause of action and the finding of jurisdiction are based upon the activities of the parent. The liability of the subsidiary is premised upon other principles of contract law. Far from merging the separate corporate existences of Bosch GmbH and Bosch N. A., both respondent and the court below carefully respected them.

In all events, there is nothing in the *Cannon Mfg. Co.* line of cases which suggests that state court factual determinations with respect to the separateness of parent-subsidiary corporate identity rises to the level of federal due process of concern to this Court. Indeed, the authority appears to the contrary.[5] Here also, petitioner seeks to have the Court plow new ground—by way of a case that does not even present the issue.

5. Indeed, one need go no further than the seminal decision, *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U. S. 333, 336 (1925): "No question of the constitutional powers of the state, or of the Federal government, is directly presented. . . . The question is simply whether the corporate separation, carefully maintained, must be ignored in determining the existence of jurisdiction." The *Cannon* facts are also easily distinguished—neither the parent nor the subsidiary corporation was of the forum state, so that the only claim of activity within the jurisdiction by the parent was by attribution to it of its subsidiary's activities.

CONCLUSION.

The decision of the Delaware Supreme Court herein represents a commendably conscientious and thoroughly rational effort to apply with meticulous care the well-thought-out directions of this Court as set forth in a recent series of landmark decisions. The success of this effort is manifest from the petition itself, which conjures up imaginary conflicts with existing authority and in reality asks the Court to extend the relevant holdings beyond their present limits, all in the face of the unassailable conclusion of the court below "that fairness and justice require jurisdiction to be asserted in Delaware under the totality of the circumstances of this case" (Pet. 12a).

The petition should be denied.

Respectfully submitted,

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